by the defendants against interest (*Shephard* v. *Cartwright* [2]).

In my view the declarations of the defendants in Ex. P.5 and the act of the second defendant in signing the conveyance Exhibit P.15 are also admissible evidence in rebuttal of the presumption for the same reason.

In considering whether the presumption has been rebutted I have taken into consideration the following facts:—

(1) The plaintiff enjoyed the rents.

(2) The plaintiff held the title deeds.

(3) The plaintiff paid the property tax and income tax.

(4) The acts of the defendants in mortgaging the property was at the direction of the plaintiff and for his benefit.

(5) The declarations of the defendants contained in Ex. P.5.

(6) The act of the second defendant in signing the conveyance Exhibit P.15 with full knowledge of the material facts.

By collecting the rents, paying the property tax and the income tax the plaintiff is in fact exercising all the functions of an owner.

The fact that the plaintiff held the title deeds is a very significant factor. In *Scawin* v. *Scawin,*[3] a father bought shares in the name of his son but retained the share certificate. It was observed by Knight Bruce V.C. (at p. 793):—

"The father may certainly, even in cases where the doctrine of advancement is held to take place, receive the title-deeds and the dividends; but although those circumstances may exist in such cases, yet they are circumstances in favour of the father, especially where the son is adult."

In the case of *Warren* v. *Gurney,*[4] a father bought a house in the name of his daughter but the title deeds were retained by the father. Morton L.J. said this (at p. 473):—

"The second contention put forward by counsel for the appellants was that, on the admissible evidence, the judge was not justified in coming to the conclusion that the defendants had rebutted the presumption of advancement. In my view, there was ample evidence to justify that conclusion of the judge. In the first place, there is the fact that the father retained the title deeds from the time of purchase to the time of his death. I think that is a very significant fact, because title deeds, as it was said in *Coke* on Littleton, are 'sinews of the land.' One would have expected the father to have handed them over, either to the plaintiff or her husband, if he had intended the gift."

It is clear that the defendants mortgaged the Tiong Bahru property at the request of the plaintiff and that they did it voluntarily and with full knowledge of the material facts. They made no claim on the Tiong Bahru property and their acts are strong evidence that they are trustees for the plaintiff.

In my view the plaintiff has discharged the burden which rests on him of rebutting the presumption of advancement and it has been established that the defendants hold the property in trust for the plaintiff.

It is submitted by counsel for the first defendant that the object of the conveyance to the defendants was to enable the plaintiff to defraud the income tax department and that the court should not assist the plaintiff to achieve this illegal object. There is no evidence that the object of the conveyance was to defraud the income tax department. The act of the plaintiff in purchasing the property in the names of the defendants is not illegal. Furthermore, (as I have said in my judgment in *Chua Koh Wee & Ors.* v. *Chua Geok Eng* [1]) I do not think that the first defendant should be allowed to suggest that the transaction was entered into for a fraudulent or illegal purpose when she had not pleaded it distinctly and she had not given any evidence about it. In this case the plaintiff has no reason to disclose any illegality and did not do so. Therein lies the distinction between *Palaniappa Chettiar* v. *Arunasalam Chettiar,*[5] on which the first defendant relies, and the present case.

In the result there will be judgment for the plaintiff with costs and the counterclaim of the defendants is dismissed with costs.

There will be an order in terms of prayers 1 and 2 of the plaintiff's claim.

Judgment for the plaintiff.

Solicitors: *Drew & Napier; Laycock & Ong; R. E. Redrup.*

MENON v. THE BROOKLANDS (SELANGOR) RUBBER CO. LTD.

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and McIntyre F.J.) August 27, 1968]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 73 of 1967]

Master and Servant — Dismissal of servant — Disobedience — Whether dismissal wrongful.

This was an appeal against the judgment of the High Court ([1968] 1 M.L.J. 15) dismissing the appellant's action for damages for wrongful dismissal by the respondents. The facts in this case showed that the respondents were not satisfied with the way in which the appellant was performing his duties as a conductor on their rubber estate and he was given a verbal warning. His work continued to be unsatisfactory and a letter of warning was addressed to him stating that any further gross carelessness and negligence in the performance of his duties would result in his dismissal. This letter was delivered to the appellant by the assistant manager and he was asked to acknowledge receipt of it but he refused to do so. Subsequently the appel-

lant was asked to see the manager of the estate but he did not do so until much later. As the interview he was asked to read the letter and return a signed copy. He refused to do so and as a result he was dismissed. It was argued that this was a case of an isolated act of disobedience on the part of the appellant and was insufficient to justify his dismissal.

Held: in this case the contumacious manner in which the appellant refused to obey instructions to see the manager of the estate went beyond a mere isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and employee and effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position. The appeal was therefore dismissed.

Cases referred to:—

(1) *Laws* v. *London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 W.L.R. 698.

(2) *Sinclair* v. *Neighbour* [1967] 2 Q.B. 279.

FEDERAL COURT.

Dato' S. P. Seenivasagam for the appellant.

R. T. S. Khoo for the respondents.

Cur. Adv. Vult.

Pike C.J. (Borneo): This is an appeal against the decision of Mr. Justice Raja Azlan Shah dismissing the appellant's action for damages for wrongful dismissal by the respondent company, The Brooklands (Selangor) Rubber Co. Ltd. The facts, which are not substantially in dispute, are fully set out in the learned judge's judgment and I do not propose therefore to restate them in full. Suffice it to say that the respondents were not satisfied with the way the appellant was performing his duties as a conductor on their rubber estate and on the 29th of December gave him a verbal warning about his work. It appears that his work continued to be unsatisfactory and on the 6th of January the respondents addressed a letter of warning to the appellant bringing to his notice that any further gross carelessness and negligence in the performance of his duties would result in his dismissal.

This letter was delivered by hand to the appellant by the assistant manager of the respondent company and the evidence of the assistant manager was that the appellant read the letter and in reply to a query from the assistant manager intimated that he understood its contents but that when the appellant was asked to acknowledge its receipt by signing a copy he refused to do so without giving any reasons.

At the hearing of this appeal his counsel Dato' S. P. Seenivasagam, rightly in my view, conceded that the appellant was without justification in refusing to acknowledge receipt of this letter but he argued that his refusal even though unjustified and even though repeated on a number of occasions was not sufficient to justify summary dismissal of the employee.

The reasons which the plaintiff gave in evidence for his refusal to sign the letter were that he did not understand the contents and that the assistant manager did not give him a copy and that if he signed it it would be tantamount to admitting the justification of the contents. As he told a different story to his counsel earlier and it seems to his union, it is not surprising that the learned judge rejected the plaintiff's evidence in this regard and preferred the evidence of the assistant manager of the respondent company.

When the appellant refused to acknowledge receipt of the letter the assistant manager reported this to the manager and a letter was then sent to the appellant instructing him to be at the manager's bungalow the following morning to accept the letter intimating that if he did not accept it he should consider himself suspended from duty. The appellant did not appear at the manager's bungalow the next morning. A peon was sent to bring the appellant to the office. He did not show up. A further message was sent in an endeavour to persuade the appellant to attend at the office to receive the letter without success and it was not until 2 o'clock that day i.e. the 7th of January that the appellant was eventually persuaded to attend at the manager's office. At that interview the manager handed him the letter, asked him to read it and sign one copy and return it to him. He refused to do so and was suspended.

It was submitted in argument that this was a case of an isolated act of disobedience on the part of the appellant in that it was a refusal to receive the one letter and that even a repeated refusal in respect of this isolated act of disobedience was not sufficient to justify the appellant's dismissal since it did not amount to rejection of or a breach of his contract. The case of *Laws* v. *London Chronicle (Indicator Newspapers) Ltd.*[1] was cited in support of this contention. In my view the facts in this case are entirely different to those in *Laws' case*. In *Laws case* the employee's act of disobedience to the order of the chairman and managing director of the respondent company was indeed a completely isolated act of disobedience and was induced by the invitation of her immediate superior. In this case there had been a previous warning of unsatisfactory work before the warning letter was delivered and the appellant's persistent refusal to acknowledge receipt of the letter fully justified, in my opinion, the view which the learned judge took at the trial that the appellant was not merely rejecting the letter but was rejecting also the criticism of his work contained in it and was giving clear notice to his employers that he did not accept their criticisms and did not intend to heed the warning. This, in addition to the contumacious manner in which he refused to obey instructions to see the manager of the estate, went far beyond a mere

isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and employee and effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position. In this connection the case of *Sinclair* v. *Neighbour* (2) seems to me to declare a principle which is relevant in this case. I find myself in complete agreement with the views of the learned judge in the court below and I would accordingly dismiss this appeal with costs both in this court and in the court below.

Azmi C.J. (Malaya) and **MacIntyre F.J.** concurred.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Sons; Shearn, Delamore & Co.*

YEO KIM KUAN v. HAMID

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and McIntyre F.J.) August 27, 1968]

[K.L. — Federal Court Appeal No. X. 74 of 1967]

Damages — Personal injuries — Plaintiff dying after delivery of judgment — Application to recall judgment — Appeal against post-dated judgment — Whether out of time — Federal Court (Transitional) Rules, 1963.

Practice and Procedure — Post-dating of judgment — Discretion under R.S.C. 1957, O. 41 r. 3 — Whether judicially exercised.

This was an appeal against the judgment of Ismail Khan J. reported at [1966] 1 M.L.J. 129. After the delivery of the judgment the plaintiff succumbed to his injuries from the accident and died. An application was made for the recall of the judgment and after hearing the parties an order was made by consent for the original judgment to be restored. The learned judge subsequently ordered that the original judgment should be post-dated to July 15, 1967. An appeal was lodged against the order post-dated judgment within one month from July 15, 1967.

Held, allowing the appeal: (1) the appeal was brought within the time prescribed by rule 13 of the Federal Court (Transitional) Rules, 1963. The recalling of the judgment must operate in effect as a recall of the pronouncement itself otherwise there was the possibility of absurd situation arising;

(2) in post-dating the judgment the learned trial judge had not exercised his discretion under O. 41 r. 3 judicially;

(3) in this case as the plaintiff had died: (i) the amount for loss of future earnings must be set aside; (ii) the amount for loss of amenities must be limited to the period when the plaintiff was alive;

(4) on the facts the plaintiff was guilty of contributory negligence to the extent of 25%;

(5) the damages should be reduced from $113,845 to $16,732.50 being a sum of $13,383.75 as general damages and $3,348.75 as special damages.

Cases referred to:—

(1) *Turner* v. *London and South Western Railway Company* L.R. 17 Eq. Cas. 561.

(2) *Winkey* v. *Winkey* 44 L.T.R. 572.

(3) *Luby* v. *New Castle-under-Lyme Corporation* [1965] 1 Q.B. 214.

(4) *Davis* v. *Swan Motor Company* [1949] 2 K.B. 291.

(5) *Nance* v. *British Columbia Electric Railway Company Ltd.* [1951] A.C. 601, 612.

(6) *Flint* v. *Lovell* [1935] 1 K.B. 354.

(7) *Rose* v. *Ford* [1937] A.C. 826.

(8) *Harris* v. *Bright Asphalt Contractors Ltd.* [1953] 1 Q.B. 617.

(9) *Wise* v. *Kaye & Anor.* [1962] 1 Q.B. 638.

(10) *West* v. *Shepherd* [1964] A.C. 326, 348 & 349.

(11) *Andrews* v. *Freeborough* [1966] 3 W.L.R. 342.

(12) *Forrest* v. *Sharp* (1963), 107 Sol.J. 536.

(13) *Quek Poh Ser & Anor.* v. *Jhagir Singh* [1962] M.L.J. lxxxviii.

(14) *Mohamed Ikhawan* v. *Johar & Anor.* [1966] 1 M.L.J. 5.

FEDERAL COURT.

Peter Mooney (*Edgar Joseph Jr.* with him) for the appellant.

T. W. Ong (*J. C. Chen* with him) for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: This is an appeal against the judgment of Ismail Khan J., in a running down case in which the plaintiff, an infant, aged 20, was knocked down and injured on the 19th of March, 1964, while crossing Jalan Bunga Raya, Malacca, by a motor car driven by the appellant. The plaintiff sustained a fracture of the cervical vertebra, resulting in permanent paralysis of both forearms, hands, trunk muscles and muscles of the lower limbs with complete loss of control over bladder and rectum. According to the medical expert who gave evidence at the trial on the 12th of August 1965, the plaintiff's life expectancy had, in consequence of the injuries sustained, been reduced from 66 years to between 40 and 45 years with every prospect of an earlier death through infection of bladder and kidney or from pneumonia.

The plaintiff, however, succumbed to infection on the 27th of October 1965, that is to say, five days after the delivery of judgment awarding him damages in the sum of $113,845, of which $110,000 was for general damages and $3,845 for special damages.

The appellant then moved the court to recall its judgment delivered on the 22nd of October, in order to alter, vary or modify the amount awarded as general damages. Upon the hearing of the application on the 15th of November, 1965 the learned trial judge made an order by consent recalling his judgment with liberty to the parties to address him. Then about a year later, on the 5th of November, 1966, the present